In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT, v. PASSAVANT & CO. } No. 129.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case comes into this court on a certificate for instructions from the circuit court of appeals for the second circuit. The facts set forth in the record are as follows:

The appellees imported certain cotton velvets into New York. These velvets were originally imported into Germany in the gray, and there dyed and finished and put in bond. The invoice stated certain prices as the net invoice value of the goods, and also stated certain additional amounts, under the heading "German duty." These additional amounts were included by the importers under duress to avoid threatened penalties under the law.

This "German duty" is a tax imposed by the German Government on the merchandise when it is sold by

the manufacturers "for consumption *or sale* in the markets of Germany" (Record, finding 5), but when purchased in bond, or consigned while in bond, for exportation, the duty is remitted, this being called "bonification of tax," as distinguished from being refunded as a rebate. The goods can be bought in bond for exportation in the principal markets of Germany at the net invoice prices and without paying the duty, and these goods were so bought.

In estimating and appraising the actual market value and wholesale price of the merchandise at the time of exportation in the principal markets of Germany, the appraiser decided that the dutiable value of the merchandise equaled the sum of the net invoice value and the German duty added together; in other words, the appraiser added as an element of dutiable value to the net invoice value the amounts entered on the invoice as German duty.

The appraiser reported to the collector the dutiable value of the merchandise as ascertained by him. The importers did not call for a reappraisement under section 13 of the customs administrative act, passed June 10, 1890, and the collector properly classified the merchandise for duty, and assessed the lawful rates of duty upon the valuation ascertained by the appraiser and reported to him. Within ten days after the liquidation by the collector of the entries, the importers filed their protest under section 14 of the act mentioned against the decision of the collector, on the grounds:

> 1. The appraiser, in advancing the value of the cotton velvets by the addition of the German duty,

did not act in accordance with his own judgment, but upon the suggestion of officials of the Treasury Department, and without regard to the evidence presented.

2. The reappraiser, in advancing the goods beyond the invoice value, disregarded the evidence as to the actual wholesale price and actual market value, and returned the goods at a valuation in excess of the actual market value and wholesale price.

3. The German duty, imposed only upon goods entering into consumption, could not be imposed upon these goods, which were exported and never entered into consumption. It was, therefore, no part of the wholesale price or foreign market value of the goods.

The Board of General Appraisers, acting upon the protest, reversed the decisions of the collector on the ground that the German duty was not a lawful element of dutiable value. The collector applied to the circuit court for a review of the decision of the board, and the circuit court, after requiring the Board of General Appraisers to return the record and evidence, together with a statement of the facts, affirmed the decision of the board. Upon these facts the circuit court of appeals desires instructions upon the following questions of law:

1. In proceedings brought before the Board of General Appraisers by protest, under section 14 of the act of June 10, 1890, to review the collector's decisions upon the entries in this case, had the board jurisdiction to inquire into and impeach the dutiable valuation so reported to the collector by the appraiser, as above stated, and upon which the collector assessed the rate of duty to which the merchandise was lawfully subject?

2. If the first question is answered in the affirmative, was the "German duty" lawfully included by the appraiser in his estimate of dutiable value?

ARGUMENT.

I.

The remedy by protest under section 14 of the customs administrative act does not lie in this case.

It is conceded the collector properly classified the merchandise;

It is admitted the collector assessed the rates of duty to which the merchandise was lawfully subject;

No dutiable costs and charges were added or imposed;

Nor were any fees or exactions of any sort whatever;

There is no attempt, therefore, to review the decision of the collector "as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage)," which alone is reviewable by protest under section 14 of the act of June 10, 1890.

The whole matter resolves itself into an attempt to impeach and review in court an appraisement on the ground that an illegal element of value was considered and included by the appraiser. This can not be done. A court can not inquire into the mental processes of appraisers. The remedy is by reappraisement under section 13.

The Board of General Appraisers has no power under section 14 to review the action of the appraiser in ascertaining the dutiable value of the merchandise reported

to the collector. Its authority is limited to a review of the decision of the collector as to the rate and amount of duties chargeable upon the imported goods, including all dutiable costs and charges, and as to all fees and exactions of whatever character. The scheme of appraisement of merchandise and liquidation of duties and review of the action of customs officers, marked out by the act of June 10, 1890, is as follows:

The importer makes the entry and files his declaration as to the value of the goods (section 5). The appraiser ascertains the actual market value and wholesale price of the merchandise in the principal markets of the country whence imported (section 10). This the appraiser reports to the collector (section 13). If objected to, a reappraisement may be obtained, first by a general appraiser, and then by the Board of General Appraisers (section 13). If not objected to, or after reappraisement, it becomes the duty of the collector to ascertain, fix, and liquidate the rate and amount of duties to be paid on the merchandise, and the dutiable costs and charges thereon, according to law (section 13). If the importer is dissatisfied with the decision of the collector as to the rate and amount of duty, or the dutiable costs and charges, or the fees and exactions, he may protest, and the action of the collector comes for review before the Board of General Appraisers (section 14). From this board an appeal lies to the circuit court for the purpose of obtaining a construction of the law and the facts respecting the classification of the merchandise and the rate of duty imposed thereon under such classification (section 15).

The appraiser ascertains the value of the merchandise. His decision as to its dutiable value is final and conclusive unless a reappraisement is obtained under section 13, in which event the reappraisement made, ultimately, by the Board of General Appraisers becomes absolutely final and conclusive as to the dutiable value of the merchandise. The design of the law is to provide a summary method of ascertaining the dutiable value of imported goods by intrusting its final and conclusive determination to certain customs officers. This is in line with the policy pursued in matters of assessment for purposes of taxation generally. The ascertainment of questions of fact is intrusted to the customs officers, while a method is presented for reviewing in a court questions of law arising out of the application of the customs statutes to the facts as found by the appraisers. A reference to certain pertinent sections of the customs administrative act may be of service to the court.

STATUTES.

Where the imported merchandise has been actually purchased, the owner is required to declare—

> that the invoice and entry which I now produce contain a just and faithful account of the actual cost of the said goods, wares, and merchandise, and include and specify the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges, and expenses incident to placing said goods, wares, and merchandise in condition packed ready for shipment to the United States, and no other discount, drawback, or bounty but such as has been actually allowed on the same. (Sec. 5, act June 10, 1890.)

It will be observed that the statement made by the importer of the actual cost of the merchandise is required to include and specify the value of all coverings and all other costs and charges incident to placing the goods in condition packed for shipment to the United States. The coverings and all other expenses incident to placing the goods in condition for shipment are treated as a part of the value of the merchandise subsequently to be appraised.

More explicit, in its definition of actual market value, is the declaration of the manufacturer or owner where the merchandise has not been actually purchased—

> that the said goods, wares, and merchandise were not actually bought by me, or by my agent, in the ordinary mode of bargain and sale, but that nevertheless the invoice which I now produce contains a just and faithful valuation of the same, at their actual market value or wholesale price, at the time of exportation to the United States, in the principal markets of the country from whence imported for my account (or for account of myself or partners); that such actual market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and is the price which I would have received and was willing to receive for such merchandise sold in the ordinary course of trade in the usual wholesale quantities, etc. (Section 5.)

The duty of the appraisers is defined by section 10 as follows:

> That it shall be the duty of the appraisers of the United States, and every of them, * * * by all reasonable ways and means in his or their power,

> to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market value or wholesale price of every of them, as the case may require.

The function of the appraisers is to ascertain the actual market value and wholesale price of the merchandise at the time of exportation in the principal markets of the country whence exported. This is to be done irrespective of any invoice, affidavit, or statement. Upon the appraisers is imposed the duty of using all reasonable ways and means to determine correctly this question of fact, namely, the actual market value and wholesale price of the imported goods.

The actual market value or wholesale price is more fully defined by section 19—

> that whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and

> all other costs, charges and expenses incident to placing the merchandise in condition packed ready for shipment to the United States. * * *

The actual market value or wholesale price defined in this section includes the value of coverings and all other costs, charges, and expenses incident to placing the merchandise in physical condition ready for shipment to the United States. In ascertaining the dutiable value of merchandise, all these elements are considered by the appraiser. He hears the evidence, he uses all reasonable ways and means, he passes upon the questions of fact, and he ascertains and determines the actual market value or wholesale price of the merchandise as bought and sold in the principal markets of the country from whence imported, in condition packed ready for shipment to the United States. The cost of the coverings and the expenses incident to placing the merchandise in such condition is to be included in the actual market value or wholesale price ascertained by the appraiser.

Section 13 requires the appraiser to "report to the collector his decision as to the value of the merchandise appraised." The decision thus reported becomes "final and conclusive as to the dutiable value of such merchandise against all parties interested therein," unless the proper steps are taken to secure a reappraisement. By way of reappraisement, the matter of determining the dutiable value may be brought ultimately before the Board of General Appraisers. In this event the collector transmits to this board "the invoice and all the

papers" appertaining to the appraisement. It then becomes the duty of the board to examine and decide the case thus submitted, and "their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein."

Here ends the method of ascertaining the dutiable value of the merchandise. No means of reviewing the decision of the Board of General Appraisers in a court is provided.

It now becomes the duty of the collector to "ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law" (end of sec. 13), and—

> The decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage) shall be final and conclusive, (beginning of sec. 14),

unless a protest is duly filed and the action of the collector taken to the Board of General Appraisers for review.

The Board of General Appraisers, under section 14, has no jurisdiction to inquire into and impeach the dutiable valuation which has been reported to the collector by the appraiser. The only method of impeaching this valuation is by reappraisement under section 13, in which event the board may inquire into the facts reflecting upon the market value and wholesale price of the merchandise. If the importer does not take advantage of the

method of review provided by section 13, and allows the dutiable valuation to be reported to the collector, and the collector to liquidate the duties, relying upon the right of protest under section 14, he is restricted to a review, not of the action of the appraiser in determining the dutiable value, but of the collector in classifying the merchandise and liquidating the duties, including all dutiable costs and charges. What he is entitled to have reviewed under section 14 is a question of law and not of fact. This is evident from the language of section 15, which provides an appeal to the circuit court in case of dissatisfaction with the decision of the Board of General Appraisers under section 14. The decision of the board, which may thus be brought for review before the circuit court, is described in section 15 as a decision "as to the construction of the law and the facts respecting the classification of such merchandise, and the rate and amount of duties imposed thereon under such classification." What the court proceeds to hear and determine is "the questions of law and fact involved in such decision respecting the classification of such merchandise and the rate of duty imposed thereon under such classification."

CASES.

In *Muser* v. *Magone* (155 U. S., 240) Mr. Chief Justice Fuller, speaking for the court, said (p. 246):

> The conclusiveness of the valuation of imported merchandise made by the designated official, in the absence of fraud, is too thoroughly settled to admit of further discussion. (*Hilton* v. *Merritt*, 110 U. S.,

97; *Auffmordt* v. *Hedden*, 137 U. S., 310; *Passavant* v. *United States*, 148 U. S., 214.)

In *Hilton* v. *Merritt* (110 U. S., 97) it was held that the valuation of merchandise made by a customs officer for the purpose of levying duties thereon is, in the absence of fraud on the part of the officer, conclusive on the importer. Mr. Justice Wood, who delivered the opinion of the court, says (p. 104):

> The provisions of the statute law show with what care Congress has provided for the fair appraisal of imported merchandise subject to duty, and they show also the intention of Congress to make the appraisal final and conclusive. When the value of the merchandise is ascertained by the officers appointed by law, and the statutory provision for appeal has been exhausted, the statute declares that the "appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly." This language would seem to leave no room for doubt or construction.

Again, page 106:

> Considering the acts of Congress as establishing a system, and giving force to all the sections, its plain and obvious meaning is that the appraisement of the customs officers shall be final, but all other questions relating to the rate and amount of duty may, after the importer has taken the required steps, be reviewed in an action at law to recover duties unlawfully exacted. The rate and amount of duties depend on the classification of imported merchandise, that is to say, on what schedule it belongs to.
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> * * * * *

The valuation made by the customs officer was not open to question in an action at law as long as the officer acted without fraud and within the power conferred upon him by the statute.

The cases of *Hilton* v. *Merritt* and *Aufmordt* v. *Hedden* were decided under the statutes in force prior to the passage of the act of June 10, 1890. In *Passavant* v. *The United States* (148 U. S., 215), an attempt was made to impeach and review in court a decision of the Board of General Appraisers, under section 13 of the customs administrative act, ascertaining the dutiable value of certain imported merchandise. This court held that, in the absence of fraud or other misconduct imputing bad faith, the decision of the Board is final and conclusive. Mr. Justice Jackson, speaking for the court, after referring to the cases of *Hilton* v. *Merritt* (110 U. S., 97), and *Earnshaw* v. *United States* (146 U. S., 60), said (bottom p. 220):

> The provisions of the customs administrative act of June 10, 1890, as to the finality and conclusiveness of the decision of the Board of General Appraisers as to the valuation of imported merchandise, when that question has been regularly submitted to and examined by them, is expressed in clearer and more emphatic terms than in former statutes. The language is so explicit as to leave no room for construction. In the tariff legislation of the Government, Congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the

fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the Government's revenues would be seriously obstructed and interfered with. The statute authorizes no such proceeding, and the circuit court can exercise no such jurisdiction.

II.

The importers seek to avoid the general rule by claiming that the appraiser, acting without authority of law and upon a wrong principle of law, added an illegal item to the market value. The cases cited in support of this contention will be distinguished later.

The conclusive answer is, that the appraiser did not add any item to the market value. The German duty was not treated as a dutiable cost or charge. It could not be so treated, *for it was not paid*. The market value was not ascertained, and the German duty added as a separate and independent cost or charge. Irrespective of the invoice price, the appraiser was charged with the duty of ascertaining the actual market value and wholesale price of the merchandise at the time of exportation in the principal markets of Germany. In this determination the general market value and wholesale price of all goods of the same description in the German markets was the controlling consideration.

The question was not as to the special advantages which the importers may have enjoyed, and which may have reduced the cost of the goods to them. To ascertain the general market value of the goods was the aim and object

of the appraisement. In doing this the appraiser treated the German duty as an element worthy of consideration. From all the facts presented he reached the conclusion that the market value of these goods as bought and sold in the principal markets of Germany "equaled the sum of the net invoice value and the German duty added together." The duty was not added to but included in the market value. Whether it should be so treated and used as an element of value to reach the wholesale price in the German markets was a question of fact, not of law. It was a question of fact which the policy of the law submits to the custom officers for final and conclusive determination. All the cases relied upon by the importers turn upon the addition to the market value of independent illegal items, or upon errors of law outside of the valuation itself.

Thus, in *Oberteuffer* v. *Robertson* (116 U. S., 499) it was held that under the act of March 3, 1883, the cost of certain cartons or boxes, in which hosiery and gloves imported into this country were packed, could not be added to the market value in order to determine the dutiable value, and that the remedy for such illegal action was not by reappraisement, but by protest and appeal. Mr. Justice Bradley, speaking for the court, after reciting the statutes involved, says (p. 509):

> Such were the enactments in force when the act of 1883 was passed. When the duty was ad valorem, or based on the value of a given quantity or parcel of goods, there was, by section 2906 of the Revised Statutes, to be an appraisement here of the actual market value or wholesale price of the goods,

> at the period of exportation, in the principal markets of the country from which they were imported, and such appraised value was to be the dutiable value of the goods, as merchandise, without reference to any of the items required by section 2907 to be added as charges to such actual market value or wholesale price of the goods. All those items so required to be added were charges, and not part of the appraised value of the goods.

The act of 1883 relieved the importer from the obligation of paying duty on the charges described in section 2907. These charges being abolished, their addition by the collector was illegal, and the proper remedy was not by reappraisement but by protest.

> The addition of the items for cartons and packing was no part of the duty or function of the appraiser, acting under section 2906, to appraise the foreign market value of the goods. Although, in form, the appraiser added the items for cartons and packing, the action of the custom-house was only a decision of the collector, under section 2931, that the cartons and packing were dutiable costs and charges.

In this case the law involved was that existing prior to the passage of the customs administrative act. By section 2906 of the Revised Statutes, then in force, the appraisement was of the actual market value or wholesale price of the goods at the period of exportation. By section 2907 certain items were to be added as costs and charges. The act of 1883 exempted the importer from paying duty on these costs and charges. But under the customs administrative act such costs and charges are

not added to but included in the market value as ascertained by the appraiser.

In *Badger* v. *Cusimano* (130 U. S., 39), a case involving the same statutes construed in the case of *Oberteuffer* v. *Robertson*, this court followed the latter case in holding that the duties on certain imported oranges were to be ascertained with reference only to their true and actual market value, and without reference to the charges for boxing and packing them. The invoice gave the market value of the oranges and also the charges for boxes and packing. The customs officers reduced the charges for packing, and increased, by that same amount, the invoice value of the oranges upon which the duties were levied. The court held the collector acted without authority, saying, by Mr. Justice Harlan (p. 43):

> The only inquiry is whether the collector acted within the power conferred upon him by statute when he required the importer to pay duty not only upon the actual market value of the goods, but upon such additional value as is equal to the reduction made from the value of the cases covering the goods. These are questions of law simply, involving the power of the collector under the statute. They are entirely apart from any inquiry as to fraud in the appraisement or as to the value set forth in it, and may be raised by the importer in an action at law when he has taken such steps as entitle him to bring suit for the recovery of duties illegally exacted from him.

In *Robertson* v. *Frank* (132 U. S., 17), this court, following the Oberteuffer Case and the Badger Case, sustained a suit to recover duties assessed upon alleged

transportation charges illegally added to the market value under the supposed authority of section 2907, Revised Statutes. In the opinion, delivered by Mr. Justice Bradley, the court points out the distinction between the appraisement of the market value of the imported goods and the addition of costs and charges under section 2907. As to these charges, no discretion was imposed in the appraisers. The actual charges paid must be added and nothing additional. If more than the actual cost or charge was added, it became a matter for examination and correction. I quote from the opinion the following language (bottom p. 24):

> What is complained of in the present case is, that the plaintiffs were required to add to the market value of the goods at the places from which they were exported transportation charges and expenses for labor which were never incurred. If that complaint is well founded such additions can not be maintained, for while the appraisers are not limited to the actual cost of articles exported, but may place upon them their market value at the places from which they were imported, and their estimate of that market value is conclusive, it could not, while the law required the addition to that market value of additional charges of transportation, etc., exercise any discretion as to those charges, but were confined to the actual cost thereof when such cost could be shown. It was "cost," not "value," which was required in that part of the estimate of dutiable value."

It will be noted that in each of these three cases an illegal item was added to the market value. In the Oberteuffer Case, the item was for cartons and packing hosiery and gloves; in the Badger Case, for boxing and

packing oranges; in the Robertson Case, for transportation charges. In neither case was there an attempt to impeach the valuation made by the appraisers. The court was careful to point out the distinction between ascertaining the market value, and adding a specific independent item to that value when ascertained, and to say, in the last case mentioned, that "whilst the appraisers are not limited to the actual cost of articles exported, but may place upon them their market value at the places from which they were imported, and their estimate of that market value is conclusive," no discretion was confided to them in the matter of adding costs and charges under section 2907.

The case at bar does not present any question involved in either of the cases discussed, but is similar, in many respects, to the more recent case of *Muser* v. *Magone*, 155 U. S., 240.

In *Muser* v. *Magone* the appraisement was attacked, not on the ground that any illegal item had been added to the market value to make the dutiable value, but on the ground that certain items or elements of value had been illegally added to and included in the dutiable value. The imported goods were cotton embroideries. The cloth on which the embroiders rested was purchased in the gray state by the importers at Manchester, imported thence to St. Gall, Switzerland, where the embroideries were finished, and thence exported to the United States. The importers owned the plant at St. Gall. The entered value of the goods was raised by the appraisers about 10 per cent. The importers protested against the standard of value adopted by the appraising

officers upon various grounds—among others, because commissions and nondutiable charges had been illegally added to and included in the market value; because the goods should have been appraised at their actual market value in the gray, adding the cost of finishing and laundering them, and for other reasons; the protest, to use the language of Mr. Chief Justice Fuller, top page 248, being directed "to the alleged illegality of the valuation * * * because, as alleged, one of the constituent elements of the value as found was illegally included."

The court held that the appraisement, in the absence of fraud, was conclusive; that the dutiable market value was to be determined by the general market value, without regard to special advantages which the importer might enjoy, and that in ascertaining that value it was proper to consider a number of elements of value. The court would not attempt to inquire into the mental processes of the appraisers in determining the valuation.

The court, speaking by Mr. Justice Fuller, says (p. 250):

> The question was not whether, through the special advantages which Muser Brothers enjoyed, the actual cost to them may have been less than what was decided to be the actual dutiable value of their goods, for the matter was determined by the general market value and wholesale price of all goods of the same description.

This is pertinent in considering whether the fact that the German duty was not paid is controlling in the case at bar. I submit it is not, the question being what was the general market value and whosesale price of cotton

velvet as bought and sold in the principal markets of Germany.

Again, top page 251:

> The issue made by the protest was that the valuation was illegal because including certain specified incidental expenses (one or more of them) as for designs, salary of buyers, clerk hire, rent, interest, and percentage on aggregate cost. Upon the theory of an ascertainable market value at St. Gall, these were matters to be considered and in a sense included, but not in the sense of substantive items independent of market value added thereto to make dutiable value.

So, in the present case, the German duty, upon the theory of an ascertainable market value in Germany, was a matter to be considered and in a sense included, but not in the sense of a substantive item independent of the market value added thereto to make dutiable value. The German duty was included only because the appraisers found, as matter of fact, that the market value in Germany was equal to the invoice price plus the German duty.

Again, bottom page 261:

> The course of business at St. Gall in respect of these embroideries was peculiar, and to reach a result, in estimating the value, required the consideration of many elements making up the amount which actually represented the pecuniary basis of transaction. How these various elements impressed the general appraisers and what grounds influenced or controlled the mental process were matters in respect of which he could not be interrogated, since

> his decision, when approved by the collector, is final. * * *
>
> The adjudication was of true market value, and did not consist in taking market value and adding the costs and charges specified in 2907 in order to get at dutiable value.

In *United States* v. *Kenworthy* (68 F. R., 904) certain items which the importers claimed to be commissions and charges (exempt from duty by the act of March 3, 1883), were treated by the appraiser as elements of value, entering into the wholesale price and market value of the imported goods. The court held that in the absence of fraud the action of the customs officers in including these items as elements of value in the wholesale price was final and conclusive. Judge Acheson, speaking for the circuit court of appeals, says (p. 908):

> It can not be successfully maintained that, under the seventh section of the act of March 3, 1883, all so-called "commissions" and other charges which may be claimed by an importer are to be allowed without inquiry as to their real nature and rightfulness. Undoubtedly it is the right and duty of those appointed and empowered to pronounce judgment upon the question of dutiable valuation to make such inquiry; and when, as the result of such investigation, the designated officials find that an alleged commission has no proper relation whatever to the importation, but that it is really part of the price of the merchandise, and they take that fact into consideration in making their appraisement, they do not transcend their rightful authority. But if the general appraiser and the collector acted here within the limits of their statutory authority, then, in the

absence of fraud (of which there is no pretense), the valuation made by the former, when confirmed by the latter, became final and conclusive.

In *Wanamaker* v. *Cooper* (69 F. R., 329) the appraiser added to the invoice price a commission of 2½ per cent claimed as a discount for cash paid. This was done, as the appraiser said, "to make market value." The action of the appraiser was sustained by the Board of General Appraisers under the customs administrative act, and the importer applied to the circuit court for a review of the decision of the board. Judge Dallas sustained the action of the appraiser, saying: "It must be assumed that the discounts which were disallowed by him were not arbitrarily rejected, but were taken as the measure of the advance which he deemed it his duty to make in appraising the true and actual market value of the merchandise." The remedy of the importer was by reappraisement, not by protest.

III.

The so-called German duty was lawfully considered and included as an element of value in determining the actual market value or wholesale price of the cotton velvets at the time of exportation in the principal markets of Germany.

Section 19 of the customs administrative act requires the duty to be assessed upon "the actual market value or wholesale price of such merchandise, *as bought and sold in usual wholesale quantities*, at the time of exportation * * * in the principal markets of the countyr from whence exported." "Such actual market value,"

using the language of the manufacturer's declaration under section 5, "is the price at which the merchandise described in the invoice *is freely offered for sale to all purchasers* in said markets."

The subsequent language of section 19 relates simply to the physical condition of the merchandise at the time of shipment, and does not subtract from but adds to its value. The goods must be appraised in the condition in which they are bought for exportation, including the value of all coverings and all other costs and charges.

In the principal markets of a particular foreign country at a certain time each kind of merchandise must have an actual market value, and but one market value. The *price* at which merchandise is freely offered for sale to *all* purchasers is one price, not two prices. To find this price in the markets of Germany was the duty of the appraiser and the object of the appraisement in the case before the court. Obeying the law, the appraiser had to ascertain the actual market value of the cotton velvets in the German markets—the price at which in those markets they were freely offered to *all* purchasers. To do this, he had to treat the German duty as an element of value and add it to the net invoice price.

According to the statement of facts, the German duty is imposed on merchandise when it is sold by the manufacturer "for consumption or *sale* in the markets of Germany;" that is to say, when the manufactured goods pass from the bonded factories into the German wholesale market they become subject to the tax. The manufacturer must add the tax as soon as he sells the goods in

Germany, for he has to pay it. As soon, therefore, as these goods reach the German markets their wholesale price includes the tax.

Suppose a purchaser goes into the German markets to buy these cotton velvets in wholesale quantities. He does not state what he is going to do with them. What price will he have to pay? Certainly one which will cover and include the duty imposed on all goods sold in the German markets. Partly manufactured goods, imported into Germany, bonded, there finished, and then exported, escape the duty, but they never reach the German market. If they do, then we have two market values and two wholesale prices at which the goods are freely offered to all purchasers in the same markets at the same time.

The statute requires the appraiser to ascertain the actual market value and wholesale price in the principal markets of Germany. This is one market value and one wholesale price. It is not *the purchase* in the markets of Germany, but *the price* in the markets of Germany, which controls. A purchase may be made in Germany of goods outside of Germany. A purchase may be made in Germany of goods whose actual cost to the purchaser is determined by conditions outside of Germany. If the goods are imported from Germany, this will not avail, however, to free the importer from the obligation of paying duty on the market value of such goods *in* Germany, the wholesale price determined by the conditions affecting all goods in the German market. In other words, the market value *in* Germany, not *outside of* Germany, or *after leaving* Germany, is the end and object of the appraisement. *In* Germany the price of cotton velvets

includes the duty; *outside of* Germany, and *after leaving* it, the cotton velvets escape the duty, which is remitted or refunded to encourage exportation and aid the introduction of German goods into other markets.

This bonification of tax is virtually the payment of a bonus. It is a privilege—a favor dependent upon the policy or caprice of Government. It is granted upon conditions; it may be allowed to one class and refused to another. To encourage manufacturers to import cotton velvets "in the gray" into Germany, finish them there, and export them, the German tax imposed upon all cotton velvets manufactured in Germany and sold there may be remitted or refunded. This is a special privilege which does not affect the price of cotton velvets generally in the German markets, and hence can not be taken into account by the appraiser. He must look to the price in the German markets, not consider the special advantages enjoyed by the particular importer which may reduce the price to him.

I submit there is no substantial difference between the bonification of tax, as in this case, and the allowance of a drawback to encourage exportations. In a recent decision of the Board of General Appraisers (Ty. Synopsis, No. 17386—G. A. 3577) it was held that an allowance for drawback, made by the French Government on importation of certain silk goods from that country to the United States, would not operate to reduce the market value of the goods for customs purposes here, the board saying:

> "Drawback" is defined by Abbott's Law Dictionary to be "a remission or repayment upon the

exportation of merchandise of duties which have been previously paid upon it."

Wharton's Law Dictionary says:

"A drawback is a device resorted to for enabling a commodity affected by taxes *to be exported and sold in the foreign market* on the same terms as if it had not been taxed at all. It differs in this from a bounty, that the latter enables a commodity to be sold abroad for less than its natural cost, whereas a drawback enables it to be sold exactly at its natural cost."

It is evident that the price paid for the goods in the markets of France amounted to a sum that, *prima facie*, included the item of drawback which is proposed to be deducted. The right of drawback is a separate and distinct claim of the exporter against the Government for a certain refund of duties. It accrues after purchase, and only in the contingency of exportation. If the goods are not exported it does not accrue and will not be paid. It can not, therefore, be deducted from the price actually paid by the vendee of the goods to the vendor.

If the contention of the importers is correct, there were two actual market values and wholesale prices for these cotton velvets in the German markets at the same time. I submit that the policy of our customs laws and their effective administration forbid a view of the law that would require the appraisers to find that the same kind of goods have two distinct market values in the same country at the same time. The law contemplates that cotton velvets of the same kind at the same time and in the same country will have but one actual market value and wholesale price for purposes of appraisement under the customs laws of this country.

In the case of *Ballard* v. *Thomas* (19 How., 383), this court held that a discount for part payment could not be considered as affecting and reducing the invoice price of imported iron. Mr. Justice Nelson, delivering the opinion of the court said (p. 382):

> There is no change, however, in the rule which must govern in making the valuation—it is the actual market value or wholesale price in the principal markets of the country from which the article shall have been imported.
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> * * * * *
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> In respect to the deduction from the price on account of prompt payment, we think the fact does not vary or affect the price of the article, as stated in the invoice. It relates simply to the mode of payment, which may, if observed, operate as a satisfaction of the price to be paid by the acceptance of a less sum.

What difference is there between a special advantage offered to exporters by a foreign government and special advantages offered by a private individual? Suppose any great manufacturer abroad, for the sake of introducing his goods into this market, should make a special rebate to American buyers. Would such reduction below the actual wholesale price of the goods in the market of the country whence exported avail to diminish their dutiable value for assessment here? Clearly not. In every instance the appraisers must go to the principal market of the country whence the goods are imported for the purpose of ascertaining the actual market value there at the time of exportation.

IV.

The decision of Judge Wheeler in this case in the circuit court proceeds upon an erroneous interpretation of the facts. He says the appraiser added the German duty to the wholesale price of the goods in Germany as a cost or charge. Since the duty was not paid this could not be done, and the case of *United States* v. *Jahn* (155 U. S., 109) was cited as showing that a protest under section 14 was the proper method of reviewing and correcting such erroneous addition to the market value.

But the German duty was not added as a cost or charge to the wholesale price or market value. It was considered and included as an element of value in ascertaining the actual market value and wholesale price of the goods in Germany. The case of *United States* v. *Jahn*, which grew out of the exaction of a fee or charge for gauging molasses under section 3023, Revised Statutes, has, of course, no application to the case at bar wherein the attempt is made to review the decision of the appraisers ascertaining and fixing the dutiable value of imported goods.

It is submitted that the first question certified should be answered in the negative; or that, if answered in the affirmative, the second question should be answered in the affirmative also.

JOHN K. RICHARDS,
Solicitor-General.

NOVEMBER 22, 1897.

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